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# In the Supreme Court of the United States

OCTOBER TERM, 1960

M. MARSHALL LANDY, PETITIONER,

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. 1-2) is reported at 283 F. 2d 303.

### JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1960 (R. 37), and a petition for rehearing was denied on December 6, 1960 (R. 41)[1]. The petition for a writ of certiorari was filed on February 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the original transcript lodged with the Court.

## QUESTION PRESENTED

Whether the district court properly refused to quash administrative summonses of the Internal Revenue Service directing a corporate officer to appear and testify, on the basis of the claim, made before any questions were asked, that the testimony to be compelled might be incriminating.

## CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States:

AMENDMENT V

> No person shall * * * be compelled in any criminal case to be a witness against himself * * *.

Internal Revenue Code of 1954:

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account

containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate, may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

* * * * *

(b) [as amended by Sec. 4(i), Act of April 2, 1956, P.L. 466, 70 Stat. 87, and Sec. 208(d)(4), Highway Revenue Act of 1956, P.L. 627, 70 Stat. 374, 387] *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being

brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United State commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 7604.)

## STATEMENT

On May 2, 1960, three internal revenue summonses were served upon petitioner, the president of three foreign corporations, requiring, in each instance, his appearance before an officer of the Internal Revenue Service on May 13, 1960, for the purpose of giving testimony relating to the respective tax liabilities of the corporations for the period 1952 to 1958 inclusive. The summonses did not require the production of any books or records. (Pet. App. 3-5; R. 2a-2c.)

On May 12, 1960, petitioner filed an application in the United States District Court for the Southern District of Florida to quash the summonses. (Pet. 4; R. 1-2). He alleged that the Internal Revenue Service agents were attempting to prepare criminal charges against him, that his relationship with the three corporations under investigation "will or might be part" of such possible criminal charges, and that to compel him "to respond and to testify to said subpoenaes would or might be violative of the applicant's rights under the Fifth Amendment to the Constitution" (R. 1-2).

The Government moved to dismiss the application for failure to state a claim upon which relief could be granted, and for lack of jurisdiction in the district court. Simultaneously, it filed a petition, subsequently amended, for an order to show cause why petitioner should not be directed to appear and testify pursuant to the summonses. (Pet. 5; R. 4-8, 18-19.) At a hearing on July 29, 1960, the District Court granted the motion to dismiss petitioner's application, and ordered petitioner to appear and testify before a Special Agent on August 15, 1960. (Pet. 5; R. 16-17.) A stay pending appeal was granted by the Court of Appeals on August 12, 1960. (Pet. 5; R. 32.) On November 2, 1960, the Court of Appeals affirmed, *per curiam*, the judgment of the District Court. (Pet. 5; R. 35.)

## ARGUMENT

This case presents only the narrow question whether the district court properly refused to quash an administrative summons *ad testificandum* on the basis of the claim that the testimony to be compelled thereunder might be incriminating. We submit that the Court of Appeals correctly held that such a general claim of possible incrimination, made before a single question has been asked, affords no ground for quashing a summons, not otherwise challenged; and that no question of substance is presented.

1. Since, at this stage of the administrative proceedings, no questions have yet been asked of petitioner, it is obviously impossible to know whether the answers to any questions that may be asked might incriminate him. Accordingly, petitioner's claim that the answers to

questions that may be asked will incriminate him afforded no basis for quashing the summons. As the court below correctly pointed out (Pet. App. 2), "[t]he privilege of the Fifth Amendment must be exercised in connection with precise questions and not as a general excuse for refusing to appear in response to subpoena. *Rogers* v. *United States*, 340 U.S. 367."[2] The privilege "must be confined to instances where the witness has reasonable cause to apprehend danger *from a direct answer.*" *Hoffman* v. *United States*, 341 U.S. 479, 486 (emphasis added). To permit its premature invocation here would not only nullify, *pro tanto*, the investigative procedures contemplated by Section 7602 of the Internal Revenue Code of 1954, *supra*, p. 2, but would also relegate to petitioner rather than to the district court, as provided by Section 7604 of the Internal Revenue Code of 1954, *supra*, p. 3, the function of determining the validity of the assertion of the privilege. *Rogers* v. *United States*, *supra*, p. 374; *Hoffman* v. *United States*, *supra*, p. 486.

Nor is there any merit to petitioner's contention (Pet. 7-10) that if he did appear in response to the summonses and refused to answer any specific question on the ground of self-incrimination, such refusal could be used against him in a subsequent criminal prosecution. This Court has repeatedly indicated that no inference of guilt may be drawn from the valid as-

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[2] See *Marcello* v. *United States*, 196 F. 2d 437, 441 (C.A. 5); *Mulloney* v. *United States*, 79 F. 2d 566, 578-580 (C.A. 1); *O'Connell* v. *United States*, 40 F. 2d 201, 205 (C.A. 2), certiorari granted, 281 U.S. 716; *Shushan* v. *United States*, 117 F. 2d 110, 117 (C.A. 5); *Application of Daniels*, 140 F. Supp. 322, 328 (S.D. N.Y.); *Shaughnessy* v. *Bacolas*, 135 F. Supp. 15, 17 (S.D. N.Y.); *In re Partridge*, decided March 2, 1959 (3 A.F.T.R. 2d 985).

sertion of the privilege against self-incrimination. *Johnson* v. *United States*, 318 U.S. 189, 196-197; *Ullman* v. *United States*, 350 U.S. 422, 426-429; *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 557-558; *Grunewald* v. *United States*, 353 U.S. 391, 415-424. See also *United States* v. *Maloney*, 262 F. 2d 535 (C.A. 2); *United States* v. *Shaughnessy*, 212 F. 2d 128, 130 (C.A. 2). The cases relied upon by petitioner are inapposite. *Beard* v. *United States*, 222 F. 2d 84 (C.A. 4), certiorari denied, 350 U.S. 846, and *Smith* v. *United States*, 236 F. 2d 260 (C.A. 8), certiorari denied, 352 U.S. 909, involved the refusal of taxpayers to turn over records to agents, not the refusal of a corporate officer to testify about his company's tax liabilities; they both turned on the question, not involved here, whether business records are public records. *Myres* v. *United States*, 174 F. 2d 329, 337 (C.A. 8), involved no Fifth Amendment question at all.

2. There is no issue here with respect to the so-called "required records" doctrine, under which certain non-corporate records required to be kept by law have been held not protected by the privilege against self-incrimination (see *Shapiro* v. *United States*, 335 U.S. 1, 16-19, 32-35). *First*, the summonses here involved call only for petitioner's testimony, not for the production of records. *Second*, the court below did not uphold the summonses on any theory of required records, but because petitioner's claim of possible self-incrimination was premature. The court's reference to the required records doctrine was made in distinguishing *Beard* v. *United States*, *supra*, which, petitioner contended, held that a taxpayer's refusal to answer during an investi-

gation, on the ground of self-incrimination, might be used against him in a subsequent criminal tax case. The court stated (Pet. App. 2) that *Beard* "stands for no such proposition * * * but is based rather on * * * the 'required records' doctrine." Petitioner's concern (Pet. 10, emphasis added) that the court below "in this case *appears* to be (*inferentially* at least) extending the 'required records' doctrine to hold that the personal books and records of a taxpayer are not subject to the constitutional privilege against self-incrimination," is thus without basis.

## CONCLUSION

For the reason stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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